FOR ARGUMENT

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No. 90-5744

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

RICHARD CHAPMAN, et. al.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et. al.,

Respondents

On Writ of Certiorari to the Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF RESPONDENT, STANLEY MARSHALL, Suggesting Reversal

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REPLY BRIEF OF RESPONDENT MARSHALL
Urging Reversal

SUMMARY OF ARGUMENT

I

(A)

The words of the statute do not clearly indicate that carrier media should be regarded as "mixtures or substances containing L.S.D." for sentencing purposes. None of the ordinary usages of the words "mixture or substance" applies to such carrier media. As such, the statute is genuinely ambiguous, and the Government's claim that the "rule of lenity" does not apply in this case is meritless.

Nor does the Government achieve success with its several specific arguments in favor of construing "mixture or sub-

stance" to include carrier media.

(1) The footnote to the "Typical Weight Per Dose" table in the Guidelines stating that the dosage weight of pure L.S.D. is less than the weight of a substance or mixture containing it is "subsequent legislative history," a poor guide to construing a statute. Anyway, the footnote is no less ambiguous than the statute, and also covers other drugs which are not marketed on carrier media.

(2) Contrary to the Government's assertion, carrier media are not equivalent to cutting agents since they neither multiply the number of doses nor, themselves, divide the drug into doses.

(3) The Government's argument that carrier media are "substances or mixtures" because they can be ingested is faulty. "Ingestibility" is not mentioned (or implicit) in the statutory language. The "ingestion test" is useless because it excludes things which are "mixtures or substances."

(4) The "unanimity" of appellate opinion construing carriers as "mixtures or substances containing L.S.D." is a deceptive one, as discussed in the opening briefs.

(B)

Contrary to the Government's claim, the aims of Congress in passing § 841(b),--focusing enforcement resources on big drug dealers and assuring uniform sentencing,--would be frustrated were carriers deemed "mixtures or substances containing L.S.D."

II

Notwithstanding the Government's arguments, carrier-weight-based sentencing remains irrational. The Government has articulated no genuine rational reasons for carrier-weight-based sentencing; the Government only offers "excuses" to show that, while odd, it is not too odd. Further, even the "excuses" fail.

(1) That dealers can "choose" their carrier does not reveal a rational reason

for basing sentencing on carrier-weight.

(2) There is no evidence that blotter paper is the "norm" these days. Even if it were the norm, carrier-weight-based sentencing produces a bizarre sentencing array within blotter paper cases.

(3) Blotter paper is not a "proxy" for the size of an L.S.D. trafficking enterprise. Not only does carrier-weight-based sentencing produce bloated sentences across the board, but carrier-weight increases at a differential rate (relative to the Guidelines) from actual L.S.D. Hence, the relationship between carrier-weight and the amount of drug being trafficked is a stochastic one.

(4) Although Congress might have fixed a flat sentence for dealing any amount of L.S.D., it did not do so. This mere possibility does not make carrier-weight-based sentencing rational.

(5) Carrier-weight is not "street weight," hence is not a rational measure

of the amount of drug actually trafficked.

(6) Carrier-weight does not measure increased dosage achieved by dilution, since L.S.D. is not sold in diluted form.

(7) Although a "Typical Weight Per Dose" Table may be necessary (as the Government argues), disparity in it is not,--and any disparity illustrates rather than disproves petitioner's claim that the sentencing scheme is irrational.

(8), (9) Arguments that the Government can evade the inequities of carrier-weight-based sentencing "departures" is not more than a claim that the system can be made rational to the extent it is disregarded.

III

The Government misconstrues Marshall's Eighth Amendment claim. Marshall did not base his claim on "absolute" sentence length. Rather, his sentence is both long ("cruel") and based on an adventitious factor unrelated to culpability ("unusual").

ARGUMENT

I

THE GOVERNMENT HAS NOT SHOWN THAT CONGRESS INTENDED TO INCLUDE CARRIER MEDIA IN THE WEIGHT OF L.S.D. FOR SENTENCING PURPOSES

Introduction

The parties agree that in 1986 Congress ordained that, in drug cases, the sentence be calculated on the basis not of the weight of the pure drug, but on the weight of any "substance or mixture containing" the drug.[1/] The parties disagree, however, on whether, in L.S.D. cases, the phrase "mixture or substance" refers to the carrier medium, here paper, on which the L.S.D. is placed for purposes of distribution.

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1. The Government claims, (Govt. Br. at 17), that "courts of appeals have consistentely rejected the argument that a sentence should rest on the net weight of the pure controlled substance." The Government cannot mean that sentences can never be based on the weight of a pure sample. Were this so, trafficking in pure drugs not be penalized.

(A)
The Government Has Not
Overcome the "Lenity"
(And Other Statutory Construction)
Arguments in this Case

Relying on the "rule of lenity" (and cognate principles of statutory construction) Marshall and Chapman contend that carrier weight should not be included in the sentencing calculus. (Marshall Br. at 28, 65-66, Chapman Br. at 27-28).

Quoting general language from several cases, the Government argues these rules are inapplicable here. (Govt. Br. 22, 23).

This Court will not profit from a volley of contradictory generalizations about when lenity applies. Nor need such a volley be launched, since the principle is simple: while the rule of lenity is not triggered merely because a statute fails to iterate each instance of misconduct to which it applies, it is invoked when there is a reasonable and lingering doubt as to what the statutory

language means in relation to a given class of conduct. Moskal v. United States 111 S.Ct. 461, 465 (1990).

In his brief, Marshall contended that "lenity" applies because the words "mixture" and "substance,"--words already problematic because they have different, (and in the case of "substance," dichotomous), definitions,--are insoluably ambiguous here.

"Substance" (in the sense that it means any form of corporeal matter, however alloyed) might describe a physical vessel which "contains" L.S.D., but settled caselaw excludes the weight of such vessels for sentencing purposes.[2/] (Marshall Br. at 31-32). On the other hand, when "substance" is used to mean a particular form of matter, (the "essence" of a thing), it does not describe so diverse an assemblage as blotter-paper-

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2. The Court of Appeals ruled that vessels ought not to be weighed. (J.A. 44). The Government agrees. (Resp. Br. at 21).

plus-L.S.D.. (Marshall Br. at 34-35).

"Mixture" might describe a blend of L.S.D. with other chemicals,[2a/] but this usgage is meaningless when applied to L.S.D. plus-paper. An alternative meaning of "mixture,"-- reciporocal blending,-- does not describe L.S.D. on paper either, because the blending of L.S.D. and paper is not reciporocal. (Marshall Br. at 36-37; see, Chapman Br. at 14-21).

Posed against these claims, the Government's reliance on cases such as Moskal v. United States 111 S.Ct. 461 (1990) and United States v. Monsanto 109 S.Ct. 2657 (1990), [(Govt. Br. at 18-23)],

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2a.In his brief, Marshall described L.S.D. tartrate as such a mixture, (Marshall Br. at 38-39, 40-42, 53, fn. 36). "Mixture" might also describe "cocktails" made up of L.S.D. mixed with other drugs. E.g., Blum, Handbook of Abusable Drugs (1979) at p. 563; Hofmann and Hofmann, Handbook on Drug Abuse: The Biological Aspects (1975), at pp. 55, 152, 154. Senator Hawkins made references to these "mixtures" of L.S.D. in the Senate during 1986. (Marshall Br. at 53, fn. 36; Amicus Br. at 6, fn. 7).

is misplaced. Those cases involved claims that the Government had failed to iterate specific types of conduct covered by the statute. Here, by contrast, the question is whether the Government can show (beyond reasonable doubt, [Moskal v. United States, supra, 111 S.Ct. at 465]), that statutory words are clear in the first place.[3/]

The Government has failed to show statutory clarity. Indeed, some of the arguments advanced by it further muddy the issue. Marshall considers the Government's arguments in sequence.

1. The Government first argues that the "Typical Weight Per Unit" table states that for drugs marked on the table with an asterisk, including L.S.D., "the weight per unit shown is the weight of the actual

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3. As such, contrary to the Government's claim, (Govt. Br. at 8), Chapman and Marshall are not trying "to fashion a special exception" to a clearly-worded statute, (e.g., Monsanto), but are merely arguing that the statute is not clear.

controlled substance, and not generally the weight of the mixture or substance containing the controlled substance." (Govt. Br. at 17, Govt. App. 4a).

A threshold problem is presented by the fact that the footnote was added to the sentencing table after petitioners (and Marshall) were sentenced,-- perhaps even in response to cases such as the present one. Reliance on the subsequently added language of the footnote is recrourse to precisely the sort of "subsequent legislative history" against which justice Scalia so aptly warned in Sullivan v. Finkelstein 110 S.Ct. 2658, 2667 (1990) (Scalia, J.. concurring).

Apart from this procedural problem, the footnote is not very useful to the Government's position. The table places asterisks beside drugs, (P.C.P., M.D.A., psilocin, psilocybin, and S.T.P.), for

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4. The footnote was added in 55 F.Reg. 19197 (May 8, 1990).

which the record provides no evidence of marketing by way of carrier media.[5] For P.C.P., Congress has explicitly set out a penalty based on the weight of the pure drug. E.g., 21 U.S.C. 841(b)(1)(A)(iv). Moreover. the table does not set an asterisk next to mescaline, which, although often sold pure, is also sometimes marketed in a carrier.[6]

At any rate, that the asterisk-marked drugs might be sold as a "mixture or substance" rather than in pure form does not prove that the "mixture or substance" in question is the sort of carrier media at issue here. The footnote provides no evidence that Congress intended the words "mixture or substance containing" to refer

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5. Indeed, psilocybin appears to commonly be sold pure. See, Hofmann and Hofmann, Handbook, supra, page 175.

6. E.g., Blum, Handbook, supra, p. 545, (mescaline sold either as pure powder or in gelatin capsules); see, e.g., United States v. Dolan 544 F.2d 1219, 1223 (4 Cir. 1976) (mescaline tablets). (Dolan is ambiguous as to precisely what was in the tablets, but they were marketed as mescaline).

to carrier media.[7/]

2. In an argument based on the mechanics of L.S.D. distribution, the Government claims that "L.S.D. "carriers" serve precisely the same function as the more familiar "cutting agents" which are typically used with other drugs," since carriers enable a dealer to distribute the drug in large quantities ...." (Govt. Br. at 20). Since, argues the Government, "cutting agents" are "mixtures or substances containing" drugs, blotter paper is a "mixture or substance" as well.

The analogy of carrier media in L.S.D. cases to "cut," however, fails.

The function of a "cutting agent" is to expand the apparent amount of a con-

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7. In a related argument, the Government states that the Drug Quantity Table specifies that, for sentencing purposes, "mixture or substance" is to have the same meaning in the guidelines as it does under the relevant statute. (Govt. Br. at 15-16). This argument begs the question; the meaning of the phrase is precisely that which this Court is called upon to determine.

trolled substance to allow for a greater number of sales. (Govt. Br. at 32). Since L.S.D. is sold by the dose, carrier media do not perform this function. (Chapman Br. at 17). Calling carriers "cutting agents" distorts the meaning of the phrase "cutting agent," as well as mischaracterizes the use of carriers in L.S.D. cases.

Not only does the analogy of carrier media to "cut" fail in terms of "function," but it fails also in terms of "form." A "cut" "divide[s] a small volume of a highly potent drug into a large number of easily separable units containing a single dose, something that could not easily be done by distributing the drug in pure form, straight from the bottle." (Govt. Br. at 19). Actually, what makes it possible to "divide a small volume of highly potent drug" is whatever dilutant in which the L.S.D. is suspended prior to being mounted on the carrier, e.g., an

alcohol suspension. (See, description at J.A. 39-40). The blotter-paper (or sugar or gel) does not serve the function of dividing up the drug.

On the other hand, the analogy to packaging materials, (which the Government concedes are not to be weighed, even in L.S.D. cases, (Govt. Br. at 21)), survives, and governs in this case. Carrier media serve the same function as do a glasseine envelopes or bindles. According to the description given (perhaps erroneously) by the Court of Appeal, (J.A. at 44-45), it is theoretically possible to pick up a grain of L.S.D. with a tiny tweezers and stuff it in between the fibers of the paper (or into the matrix of a gel or the grains of a sugar cube). How this would differ from stuffing cocaine into a glasseine envelope is too gossamer a distinction to essay.

Concededly, concentrations of some "cut"

drugs may be low in individual cases. E.g., United States v. Buggs 904 F.2d 1070 (7 Cir., 1990). But that blotter paper carries L.S.D. in similarly low concentrations, (Govt. Br. at 27-28), does not turn something which is not a "cut" into a "cut." When a drug is cut, "the mixture is then sold as a heavily diluted form of the drug." (Govt. Br. at 27). Neither Marshall nor Chapman sold his L.S.D. as "diluted;" each sold "pure" L.S.D. packaged on a carrier for delivery to the consumer.

3. Respondent next argues that unlike glasseine envelopes (or other vessels), "the blotter paper itself can be and is ingested with the drug[8/] much the same as any dilutant or cutting agent would be

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8. The Government's own expert at Marshall's bench trial testified that it was immaterial whether the carrier media was ingested or not. (Tr. 49). Indeed, in a different part of its brief, the Government agreed that the paper need not, itself, be ingested. "Users can ... lick the L.S.D. off the paper." (Govt. Br. at 4).

ingested." (Govt. Br. at 20). By contrast. bottles and cars are not "substances containing" drugs "because they are not ingested along with the drug. When L.S.D. is carried in a jar, the L.S.D. and the jar are not a "mixture or substance" any more than cocaine and tinfoil are a mixture or substance ...." (Govt. Br. at 21). This argument is faulty in two ways.

First, if "ingestion" is the key to the definition of "mixture or substance," cocaine (as "cut"), would not be a "mixture or substance containing cocaine."[9/] The "dictionary" definition of "ingest," is to "eat." Websters Third New International Dictionary (1986), page 1186. One

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9. The "ingestion" test also spoils the Government's reliance on the "dictionary" definition of "mixture" as "two or more components ... that however thoroughly commingled are regarded as retaining a separate existence." (Govt. Br. at 18). If L.S.D.-plus-paper, gel, or sugar is purchased as a single item, swallowed whole, and digested intact, the paper and the drug cannot each be "regarded as retaining a separate existence."

does not "eat" cocaine; one absorbs it through the mucosa of the lungs.

Perhaps, then, a larger (non-dictionary) definition of "ingest" is required to make the Government's point; maybe "ingest" should be redefined as "take into the body." But under this definition, the needle on a heroin syringe would be "ingested," hence would be a "mixture or substance containing heroin,"--a palpably absurd result. But calling a needle a "mixture or substance containing heroin" is no more absurd than is calling blotter paper a "mixture or substance containing L.S.D."[10/]

Second, anchoring the definition of "mixture or substance" on "ingestibility" will warp the results in two other kinds of drug cases.

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10. Indeed, the analogy is very close. The needle is extracted from the arm after serving its purpose; similarly, the fiberous paper is not digested, but is extracted, (as excrement), from the gut of the L.S.D. consumer days later.

In one such kind of case, ingestible material is not weighed along with the drug. For example, when some drugs are sold in gelatin, the capsules are not weighed. (Marshall Br. at 31; Tr. at 50, 56).

Conversely, in methamphetamine cases, non-ingestible material is weighed. According to the Court in United States v. Butler 895 F.2d 1016, (5 Cir., 1989), cert. den. 111 S.Ct. 82 (1990); cf., United States v. Baker 883 F.2d 13, 15, cert. den., 110 S.Ct. 517 (5 Cir., 1989), manufacturing-effluent containing a fraction of methamphetamine is a "substance containing methamphetamine," even though it is not intended for ingestion. Under the Government's own "ingestion test," methamphetamine "wash" ought not to be regarded be a "mixture or substance containing" methamphetamine,-- an absurd result both in practical terms and according to the Government's own position in Butler.

That the Government was forced to redefine "substance containing" as "ingestable,"--a construction which finds no basis in the actual statutory language,--is revelatory of how far-fetched the Government's construction of the statute has turned out to be.

4. The Government cites to thus-far unanimous appellate opinion which holds that L.S.D.-plus-carrier is either a "mixture," [J.A. 44-45], or a "substance," [United States v. Daly 883 F.2d 883 F.2d 313, 317 (4 Cir., 1989), cert. den. 110 S.Ct. 2622 (1990); United States v. Bishop 894 F.2d 981 (8 Cir., 1990)]. (Govt. Br. at 11, 19-20, 23, 26, fn. 11, cf., 18).

As Marshall pointed out in his opening brief, however, (Marshall Br. at 30-45), the real purport of these decisions is that the courts have split.--(some courts regarding the paper as a "mixture" but not a "substance," and vice

versa),--and that the split accrues from dichotomous definitions for the key words "mixture" and "substance."

That Courts which purport to find the statutory language unambiguous disagree about the meaning of key words in that statutory language shows that the semantic bedrock of the statute is shakey. It is troubling,--and telling,--that the Government has not answered Marshall's argument.

(B)
The Government Has Not
Shown That The Legislative
History Supports Its Position

Citing extensivly to the history of Federal antidrug legislation, the Government argues that, by 1986, "Congress knew how to distinguish between the weight of a pure drug and the weight of a "mixture or substance" containing some quantity of the drug." (Govt. Br. at 12).

It does not follow from this, of course, that blotter paper is a "mixture

or substance" within the meaning of the statute. Nor does United States v. McGeehan 824 F.2d 677, 681 (8 Cir., 1987), cert. den., 484 U.S. 1061 (1988),--decided a year after Congress enacted the relevant language,--provide proof of what Congress meant to say in its previous session.[11/]

What is relevant in the legislative history is that Congress enacted the anti-drug act of 1986 in pari-materia with that provision of the determinate sentence act which called for uniformity in sentencing for similar crimes. 18 U.S.C. 3553(a)(6); see, 21 U.S.C. 991(b)(1)(B). In his opening brief, Marshall has shown how weighing carrier media in L.S.D. cases will produce grossly lengthier sentences for L.S.D. sales than for the sale of any

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11. The only inference which the McGeehan Court logically drew was that prior to 1986, Congress did not intend to weigh blotter paper; it does not follow from this, that Congress did intend to weigh blotter paper after 1986.

other drug, (Marshall Br. at 26-27), and produces disproportionate results within the range of sentencing in L.S.D. cases. (Marshall Br. 25-26, 62). The Government does not discuss this aspect of the history,--a significant omission.

Nor does the Government discuss that the reason advanced by Congress for enacting the "mixture or substance" provisions of the anti-drug act was to target scarce law enforcement resources at (1) kingpins and (2) mid-level managers. (See, H.R. Rep. No. 845, 99 Cong. 2d. Sess., Pt. 1, at 11-12; 132 Cong. Rec. S. 14270-14271 (9/30/1986); Marshall Br. at 46-47, 49-50). In his brief, Marshall has argued that only if carrier media are not weighed in L.S.D. cases will sentencing of L.S.D. offenders place mid-tier dealers such as Marshall in the proper sentencing range (as opposed to in the range reserved for "kingpins" dealing millions of doses).

(Marshall Br. at 50-51). Moreover, the reason for the three-tier approach of amended-21 U.S.C. 841(b), is to focus scarce law-enforcement resources where they are really needed,--primarily on "kingpins" and then on "managers of the retail traffic." H.R. No. 99-845, supra. at 11. Marshall has argued that carrier-weight-based sentencing will frustrate these goals by wasting law enforcement resources on mid-tier dealers (pretending they are "kingpins" when they are not), and by making the L.S.D. trade harder for law enforcement officers to detect and disrupt as traffickers restructure their operations without diminishing profit. (Marshall Br. at 72-74). These arguments remain unanswered by the Government's brief.[12/]

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12. The Government faults Chapman for referring to correspondence between the Sentencing Commission and Senator Biden to show the ambiguity of the statute. (Govt. Br. at 23-26). The Government misconstrues the point of the

[cont. on page. 25]

Conclusion to Part I

Congress in 1986 intended that the weight of impure drug samples would be the basis for sentencing in Federal narcotics cases. It does not follow, however, that Congress intended to weigh inert carriers such as gelatin, sugar, or paper to determine the sample-weight in L.S.D. cases. To the contrary, everything augers against such a construction of the statute.

II
EVEN IF CONGRESS INTENDED THAT CARRIER MEDIA BE WEIGHED IN L.S.D. CASES, THE RESULT WOULD BE IRRATIONAL

Chapman and Marshall have argued, (Chapman Br. at 38-44; Marshall Br. at 66-81), that the carrier-weight-based

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[fn. 12, cont. from page 24] reference. Wilkins' confusion is not an aid to statutory interpretation, but rather show the statutory language is too unclear to be "interpreted" at all, and thus supports invocation of the rule of lenity.

sentencing scheme is irrational.

None of the arguments advanced by the Government in response have merit.

One comment might be made at outset. Under the "rational basis" test, legislative classifications must be "rationally related to a legitimate governmental interest." **Department of Agriculture v. Moreno** 413 U.S. 528, 533 (1973); **Baxtrom v. Herald** 383 U.S. 107 (1966). Disturbingly, the Government has articulated no such interest which might be served by carrier-weight-based sentencing. Rather, all of the Government's contentions seem to be "excuses" as to why such sentencing, if odd, is not too odd.

As appears below, even these "excuses" lack merit.

1. The Government contends the trafficker selects the carrier, hence has control over any irrationality in the sentencing scheme. (Govt. Br. at 33).

Although Marshall and Chapman indeed "chose" to market their L.S.D. on paper, it is clear that they did not do so with a subjective awareness of the consequences of this choice in terms of carrier-weight-based sentencing. That Chapman and Marshall voluntarily did something of no apparent significance to them does not make a later, arbitrary interpreation of their conduct a rational one. Marshall and Chapman have argued in their briefs that should carrier-weight-based sentencing ultimately prevail, traffickers will modify their activities to avoid the new statutory reach,--with disasterous consequences for the goals of the anti-drug legislation. (Marshall Br. at 72-74). In this hypothetical future, "choosing" carrier media might have a significance. For now, it proves nothing about the rationality of the statutory scheme.

2. The Government states that since

"blotter paper seems to be the norm these days," (Govt. Br. at 34-35, citing J.A. 61),[13] neither Chapman nor Marshall has standing to complain of any sentence which a trafficker might receive for using a heavier carrier, (Govt. Br. at 33), and they have not, in any event, shown that sentencing in L.S.D. cases has proven arbitrary.

Contrary to the Government's assertion, there is no evidence that "blotter paper seems to be the norm these days." The defendant in United States v. McGeehan, supra, 824 F.2d at 681 trafficked in L.S.D. on gelatin capsules; see, also, United States v. Dolan, supra, 524 F.2d

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13. The Government implies that references to carriers other than blotter paper are "curious hypothetical examples," (Govt. Br. at 34), which prove nothing in the real world. In light of the Government's own concession that the act requires weighing a sugar cube for sentencing purposes, (Govt. Br. at 21), (triggering a 5 year minimum sentence for a single dose), it is hard to fault petitioners for fanciful hypotheticals.

1219 (L.S.D. and other drugs on tablets).

Even if blotter paper were the norm, carrier-weight-based sentencing would still be irrational. Although blotter paper is common, gelatin is not an uncommon carrier. Had Marshall sold his 11751 doses, (J.A. 39). on gelatin, he would have sold an aggregate of 26.43 grams. (See, McGeehan, supra, 824 F.2d at 680.). His base offense level would have been 32 on the "Drug Table," (U.S.S.G. Table 2D1.1), for which a sentence of as little as ten years (as opposed to Marshall's twenty) is possible.[14/]

Even within the narrow ambit of blotter paper trafficking, itself, Chapman and Marshall can point to grotesque results in actual reported cases. In dissent, Judge Posner mentioned Rose, [United States v.

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14. Even with his upward-adjustment of two levels, (Govt. Br. at 38, fn. 18), Marshall would have been elibigible for a sentence of as little as 151 months,--a reduction by 1/3 of what he received.

Rose 881 F.2d 386 (7 Cir., 1989)], who sold less than half as many doses as Chapman, yet who (in terms of the Guidelines), was eligible for a longer sentence. (J.A. 78, Posner, J.. dissenting).[15/] In his brief, Marshall has pointed out that had he traded blotter paper with Chapman and then each had sold the same number of doses as were, in fact, respectively sold, the sentence results in each case would have differed radically.[16/]

3. The foregoing belies the Government's

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15. 7.2 grams of L.S.D. on Table 2D1.1 is level 30, which carries a sentence range of 97-121 months. The base range for Chapman's 5.7 grams of paper is 78-97 months. In actual fact, Rose was not sentenced under the Guidelines.

16. See, J.A. 41, fn. 1. Had Marshall used Chapman's paper (at .0057 gm. per dose), he would have dealt 67 grams of "L.S.D." for a base offense level of 34 (instead of 36). Had Chapman dealt his 1000 doses on Marshall's .00964 gm. paper, he would have dealt 9.64 grams of L.S.D., for a base offense level of 30 (instead of 28) Forty more doses, and Chapman would have crossed-over into level 32, nearly doubling the sentence-range for which he actually was liable.

assertion that weighing the carrier medium "serves as a rough proxy for the size of the defendant's criminal enterprise." (Govt. Br. at 33).

The extreme heaviness of paper relative to the weight of pure L.S.D. would make this "proxy" a rough one, indeed, even if paper-weight increased relative to the Guidelines at a rate correlate to the weight-increase of the L.S.D. on the paper.

In fact, however, paper-weight increases at a differential rate relative to the guidelines than does the L.S.D., itself, thus warping any correlation between paper-weight and the size of the enterprise. For example, had Chapman doubled the volume of L.S.D. he sold, he would have stepped up two notches on the sentence table based on the weight of the drug, itself, but four notches based on the weight of the paper. Although the

discrepancy ultimately evens out (somewhat) at higher levels,[17] the carrier is not a "rough proxy" for the size of a trafficking operation in many cases.[18]

Even when, under rare circumstances, the "increase discrepancy" vanishes entirely, paper-weight is not a "rough proxy" for the size of the enterprise because any match-up between paper-weight and enterprise-size is purely coincidental. The true size of an L.S.D. "enterprise" is the number of doses which a trafficker dispenses (since this is how the enterprise markets its

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17. Had Chapman multiplied his dealing sixfold, he would have advanced four spots on the sentencing table for the pure drug, and six for the paper. While this is still a differential increase, the difference is somewhat less than that which occurs at lower levels.

18. Dean put roughly 200 doses on roughly a gram of paper. (J.A. 77, Posner, J., dissenting). Assuming the doses weighed .05 mg. each, each sheet contained 10 mg. of L.S.D. One would have to multiply the L.S.D. 5, 10, and 20 times to move-up two, four, or six steps on the guidelines; one would only have to multiply the paper 4, 7, and 10 times to get the same increases.

wares), and the foregoing actual cases show that the weight of the carrier bears a stochastic relationship to the number of doses sold by any given individual.

4. The Government argues that since Congress might have passed a fixed sentencing statute punishing all trafficking (regardless of amount) with a twenty year sentence, Chapman and Marshall have no reason to complain. (Govt. Br. at 33, 35).

Although "Congress could have written the statute to produce this result," [McElroy v. United States 455 U.S. 642, 656 (1982)(emph. added)], "[t]he short answer is that Congress did not write the statute that way." Russello v. United States 464 U.S. 16, 23 (1983). Had Congress written such a statute, it would be Draconian but not arbitrary. As presently written (according to the Government), the sentencing scheme is not merely harsh, but arbitrary.

A hypothetical suggested by the Government's own brief illustrates the point. The Government has illustrated the potency of L.S.D. by arguing that a mere three ounces of it could intoxicate every person in Glasgow, Scotland. (Govt. Br. at 19-20, fn. 10). According to the 1989 World Almanac, (p. 729), Glasgow has a population of 751,000. Marshall was given a twenty year sentence, (J.A. 39), for selling 113 grams, (four ounces), of "L.S.D.." But his L.S.D. was only enough to drug a metropolis ranging in size between Avacado Heights, California and Eunice, Louisiana.[19] As for the fiend who poisoned Glasgow, he sold only about 75 grams (U.S.S.G. level 34). His sentence is less than Marshall's.

But one need not result to fanciful hypotheticals. A study of the actual

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19. The respective populations are: 11741 (Almanac, supra, at p. 545), and 12479 (p. 554).

prosecutions cited by Judge Posner, (J.A. 77-78),--or, for that matter, a comparison between petitioners Chapman and Marshall's paper-weights in this very case,--shows that carrier-weight irrationally distinguishes between L.S.D. offenders, even as it rockets all L.S.D. sentences to stratospheric heights in comparison with the sentences imposed for dealing other drugs.

5. The Government argues that it is rational to measure the quantity of drugs according to their "street weight," and that "every court of appeals that has addressed the issue has [so] held." (Govt. Br. at 31). But this observation is true only if a drug has a "street weight." L.S.D. does not have a "street weight" in the sense to which the Government refers. Unlike other drugs such as heroin or cocaine, L.S.D. is not sold by the "street weight" of the mixture or substance containing it, (Marshall Br. at

21), but rather, is sold by the dose (J.A. at 12; Chapman Br. at 6; Govt. Br. at 4).

6. The Government argues that "up to the point that the market will allow, diluting a drug increases the trafficker's profits and allows him to distribute his wares more widely." (Govt. Br. at 32). This, apparently, justifies increased sentencing for diluted drugs. As both Chapman and Marshall have argued, however, (Chapman Br. at 16; Marshall Br. at 55-56), placing L.S.D. on gel, sugar, or paper for distribution is not the same as "diluting" it. The drug is still dealt in "pure" form, albeit mounted on a carrier. Indeed, in these cases, the doses dealt were more potent than the average dose set by the Typical Weight Per Unit table.[20/] Moreover. placing L.S.D. on any specific carrier bears no relationship to the

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20. Compare Table, supra, page 7, (50 micrograms per typical dose) with J.A. at 41, fn. 1: Marshall's L.S.D. was 57 micrograms per dose and Chapman's was even purer.

to the profits of the dealer. There is surely no evidence here that profits increase in proportion to the weight of the carrier. The rationale for increasing punishment for "cutting" a drug is that such "cutting" increases the number of available doses. United States v. Holmes 838 F.2d 1175, 1177-1178, cert. den., 486 U.S. 1058 (11 Cir., 1989). As indicated, placing a gram of L.S.D. on blotter paper does not increase the number of doses; it just portions-off the gram into the number of doses latent in it from the outset.

7. Answering claims that the irrationality of the carrier-weight-based scheme is illustrated by the fact that the Typical Weight Per Dose table excludes the weight of the carrier, the Government answers that use of such a table is necessary in certain kinds of cases. (Govt. Br. at 32). While this is arguably a valid premise, it does not explain why

the dose-weights listed on the "table" are so disparate from the weights involved in the instant cases. Nor does it answer to the constitutional objection that this disparity is irrational.

8. The Government next argues that various provisions of both the anti-drug laws and the Sentencing Guidelines provide sufficient flexibility to avoid unfair results in L.S.D. cases. Specifically, the Governemnt argues that major drug traffickers can be prosecuted under the "continuing criminal enterprise" statute, [21 U.S.C. 848], (Govt. Br. at 32), and that a judge can depart upward from the Guildines for cases involving pure L.S.D. (or for the status of a given dealer as a "leader/organizer"). (Govt. Br. at 32-33).

The "C.C.E." claim can be readily rebutted. One element in a C.C.E. prosecution is proof that the entepreneurs acted in concert with five or more other

persons in a management role. 21 U.S.C. 848(d)(2)(A). Neither Chapman, (J.A. 4-8) nor Marshall were involved in such big enterprises; pure or not, their L.S.D. trafficking could not give rise to a C.C.E. prosecution, and the Government has offered no evidence that ordinary L.S.D. "rings" are big enough to trigger C.C.E. prosecutions in many, if any, other cases. Indeed, that neither Marshall's nor Chapman's enterprise was big enough to fall under the C.C.E. statute underscores that they are not the "big time" dealers that their lengthy sentences would imply.

The "upward departure" argument is also without merit. If "carrier cases" are sentenced in the Draconian manner championed by the Government and all other cases are "upwardly adjusted," no one would get the statutory penalty for trafficking in L.S.D..

Nor has the Government offered

indication that upward departures of the sort suggested by it have ever been tried.[21] That someone dealing in pure L.S.D. might, at some future time, face harsh punishment provides no solace to persons serving "prison sentences ex-ceptionally harsh by the standards of the modern Western world." (J.A. 81, Posner, J., dissenting).

9. In a complementary argument, the Government suggests that defendants similar to Chapman can receive "downward departures" and other adjustments.[22] (Govt. Br. at 36-37). The Government has not

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21. It is disquieting that the Government draws on hypothetical "escape mechanisms" to rationalize the sentencing scheme when the defense was precluded, on appeal, from pointing to hypothetical disparities to illustrate its inequities. (J.A. at 51).

22. The Government states that all three petitioners here "benefitted from these departure provisions." (Govt. Br. at 37). The sentence of imprisonment imposed on Schoenecker, however, reveals "a term at the lower end of the guideline range," (J.A. 26), rather than a downward departure. Nor did Marshall receive a "downward departure." (Govt. Br. at 38, fn. 18).

explained how "downward departures" can lend rationality to carrier-weight-based sentencing. The argument seems, rather, to be that downward departures may palliate on shocking occasions. Essentially, the Government is arguing that the sentencing scheme at issue here is rational to the degree that courts choose to disregard it.

Conclusion to Part II

The Government has offered no reason for carrier-weight-based sentencing, and its various disclaimers that the scheme is unfair are not persuasive.

III
THE GOVERNMENT HAS NOT REBUTTED MARSHALL'S CRUEL AND UNUSUAL PUNISHMENT ARGUMENT

In a footnote, (Govt. Br. 30, at fn. 13), the Government argues that Marshall's forty-year sentence is not excessive in

light of Hutto v. Davis 454 U.S. 370 (1982). This argument misses the point of Marshall's Eighth Amendment argument. (Marshall Br. at 91-97).

Marshall never complained that a twenty year sentence for drug dealing was, of itself, violative of the prohibition against cruel and unusual punishments. A uniformly-applied twenty year sentence for L.S.D. trafficking at Marshall's level would pass constitutional muster because however "cruel,"[23] it would not be "unusual." On the other hand, a capriciously-applied statute which punishes some, but not others, on the basis of an adventitious factor wholly unrelated to actual culpability, would be not only cruel but unusual as well, and hence would run afoul of the Eighth Amendment. Carrier-weight is wholly unrelated to crimin-

23. Even the Seventh Circuit majority found the sentence to be "harsh." (J.A. 62; see, J.A. 81).

ality. A person who sells the same number of doses of L.S.D. on a heavier weight of blotter-paper than another is not a worse criminal. Yet, under carrier-weight-based sentencing, he receives a harsher penalty. When, as in Marshall's case, the punishment is objectively long, such punishment is clearly cruel and unusual within the meaning of the Eighth Amendment.[24]

CONCLUSION

In the clear light of a real world, carrier-weight-based sentencing is absurd and unfair. L.S.D. is not marketed in terms of the weight of the carrier on which it is mounted. Weighing that carrier as the basis for punishment in

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24. In an appendix, Chapman has set out a number of cases which found similar or longer absolute sentences not to violate the Eighth Amendment. Obviously, these cases are inapposite, since none predicated a lengthy sentence on a wholly adventitious factor.

L.S.D. cases yields unconscionably long prison terms for crimes which, with regard to any other illegal drug, would be treated much less harshly. Within the ranks of L.S.D. dealers, carrier-weight-based sentencing produces a wierd, disparate schedule of sentencing results.

Only by turning down the lights and squinting can the Government see the statute as commanding that the "mixture or substance" to be weighed in L.S.D. cases is the weight of the carrier on which the drug is packaged.

Carrier-weight-based sentencing finds no support in either the language or history of the statute; offends against the Determinate Sentencing scheme; and runs afoul of the Fifth and Eighth Amendments to the Constitution. The Government's brief has not proven the contrary.

The judgment of the Seventh Circuit

should be reversed.

DATED:

Respectfully Submitted:

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